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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-210

In the Matter of the Application of County of Nassau Acquiring Property for the Mill Neck Conservation of the Area of Open Space and Excess Lands, Incorporated Village of Bayville, Town of Oyster Bay, Nassau County, New York

THE COUNTY OF NASSAU,

Appellee,

—against—

EVEANDRA ENTERPRISES, INC.,

Appellant.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

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The Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Court of Appeals of New York on the ground that it is manifest that the question on which the decision of the cause depends is so unsubstantial as not to need further argument.

I

The State Statute Involved and the Nature of the Case

A. The Statute

This appeal raises the question of the validity of §3-a(2) of the General Municipal Law of New York, as amended by L 1 939 C 1102 (23 McKinney's Consolidated Laws of New York).

Section 3-a of the General Municipal Law deals with the rates of interest on judgments and accrued claims against municipal corporations. The section that is relevant in this case is subdivision "2" which states:

> "(2) The rate of interest to be paid upon any judgment or accrued claim against the municipal corporation arising out of condemnation proceedings or action to recover damages for wrongful death shall not exceed six per centum per annum."

As the statute clearly states, six percent annual interest is the maximum to be paid in compensation for a condemnation proceeding. There is no provision in the statute which provides for payment of interest in excess of that amount.

B. The Proceedings Below

On October 7, 1969 the subject property, vacant land, located in the northwest section of the meadowland of Mill Neck Creek partially in the Village of Bayville and partially in the unincorporated area of Locust Valley, in the Town of Oyster Bay, County of Nassau was acquired by a proceeding in eminent domain for conservation purposes.

The owner of record on the date the title to the property vested in the Appellee, was Claimant-Appellant Eveandra Enterprises, Inc. (hereinafter Appellant) who acquired title in October, 1968. By decision after trial, dated December 19, 1974, the Supreme Court, Nassau County, made an award for damages for the subject parcel in the amount of $261,300.00. A Partial Tentative Decree awarding such amount as Appellant's damage, with interest thereon at the rate of six per cent was entered on January 30, 1975.

Pursuant to Chapter 1161 of the Laws of 1971 (McKinney's 1971 Session Laws of New York, 194th Session at p. 2190), Appellee made an advance payment to Appellant in the amount of $107,725.75. The balance upon which interest was due was therefore $154,474.25. Interest at the statutory rate of 6% ran from October 7, 1969, the date title vested in Appellee, to January 30, 1975, the date upon which the Partial Tentative Decree was handed down. By check dated August 12, 1975, Appellee paid Appellant the balance plus interest due, in the amount of $208,797.96.

On March 3, 1975, Appellant filed Verified Objections to the Partial Tentative Decree alleging that the award constituted the taking of property without just compensation.

Special Term of the State Supreme Court, Nassau County, (Albert, J.), held a hearing on the issue of the amount of interest awarded. Appellant offered the testimony of two experts, which showed that the prime rate of interest between 1969-70 ranged from 8½% to 8%, that returns to the County on bank Certificates of Deposits was 7.29% per annum, that the "true" rate of interest on most loans from banks was 12%, and that the median average between the return to the County on its

Certificates of Deposit and the return to banks on their loans to borrowers was 9.75% per annum. There was no testimony that Appellant had any damage requiring any extra payment.

Justice Albert held that "the 6 per cent interest paid on the condemnation award herein is fair and within the judicial ascertainment of just compensation."

The Appellate Division of the Supreme Court, Second Department, unanimously affirmed Special Term.

Appellant appealed to the Court of Appeals on the question of the constitutionality of §3-a(2) of the General Municipal Law. Appellant contended that the decision of the Appellate Division was repugnant to the Fifth and Fourteenth Amendments to the Federal Constitution.

The Court of Appeals affirmed the Appellate Division and held that the appropriate interest rate is not measured by fluctuations of interest rates for public or private securities or lending, and that "so long as the statutory rate constitutes a judicially acceptable fair return for the deprivation of the use of that property or the money equivalent of that use . . . the statutory rate should be considered proper."

II

Argument

Since *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 43 S. Ct. 354, 67 L. Ed. 664 (1923) "just compensation" under the Fifth Amendment when used in connection with condemnation proceedings embraces not only the value of the property at the date of taking, but whenever the taking precedes payment the term also includes "such addition as will produce the full equivalent of that

value paid contemporaneously with the taking, . . ." (at 67 L. Ed. 670)

The specific question involved in this action is whether the statutory interest rate of 6 per cent per annum under §3-a(2) of the General Municipal Law of New York is a deprivation of such just compensation guaranteed by the Fifth Amendment.

The Fifth Circuit in *U. S.* v. *Baugh et al.*, 149 F. 2d 190 (1945), held that in condemnation proceedings where the taking precedes payment, the additional value which landowner is entitled to for purpose of producing full equivalent of value of property paid contemporaneously with taking, *"may be measured by the legal rate of interest, if reasonable, in the state where the property is located."* (at 193) (emphasis added) (C.F. *Phelps* v. *U.S.*, 274 U. S. 341, 47 S. Ct. 611, 71 L. Ed. 1083 [1927]).

To demonstrate that §3-a(2) is unconstitutional, Appellant must prove that the application of that provision is unreasonable and violative of substantive due process of law. It would be necessary for Appellant to prove that this provision bears no rational relation to the legitimate governmental interest of providing just compensation for the taking of land only (without further damages). He must also overcome the presumption of constitutionality and the proper legislative purpose of said statute.

Appellee contends that Appellant did not meet that burden in the New York Supreme Court, Nassau County, in the Appellate Division, in the Court of Appeals of New York, nor does he meet that burden here.

Appellant attempts to pose a substantial federal question for this Court to consider. He is unable to do so, for one does not exist.

Appellant contends that §3-a(2) as applied by the Court of Appeals of New York is in direct conflict with decisions of the Supreme Court of the United States which hold that interest on a condemnation award is part of just compensation whose determination is solely a judicial function and that the Legislature cannot say what compensation should be paid.

It is respectfully submitted that such is not the case. Clearly, by the very language of the Court of Appeals, the Court recognized that interest is part of the just compensation. Furthermore, the statutory interest is subject to judicial review to assure a fair return for the deprivation of the use of property.

A proper reading of the cases cited by Appellant on this point (*Seaboard Air Lines Ry. Co.* v. *U. S.*, 261 U. S. 299 [1923]; *Jacobs* v. *U. S.*, 290 U.S. 13 [1933]; *Phelps* v. *U. S.*, 274 U.S. 341 [1927]; *Monongahela Navigation Co.* v. *U. S.*, 148 U. S. 312 [1893]; and *U. S.* v. *Commodities Corp.*, 339 U. S. 124 [1950]) will disclose the clear distinctions between those cases and the instant action. *Seaboard, Jacobs,* and *Phelps,* supra, all involved condemnation proceedings brought under statutes that did not provide for interest. Obviously, the ascertainment of the rate of interest to be applied in such a situation must be a judicial function. In the present case, due to the existence of a presumptively valid statutory interest rate, the judicial function is narrowed to that of review of reasonableless. *U. S.* v. *Baugh,* supra, at 193.

Neither *Monongahla,* supra, nor *Commodities,* supra, deal specifically with the issue of interest in a condemnation award proceeding.

U.S. v. *Blankinship,* 543 F. 2d 1272 (9th Cir. 1976) held that the determination of whether a proper and reasonable

rate in excess of 6 per cent is required and the amount of such rate is a factual question and should be determined by the trier of fact. (C. F. *U. S.* v. *100 Acres of Land,* 468 F. 2d 1261 [9th Cir. 1972]). This is not in conflict with the case at hand. There was ample evidence before the Court concerning alternative rates of interest and what damages were sustained by the Appellant, there was none in this case. Obviously, the lower Court remained unconvinced by this evidence that 6 per cent per annum was not a fair return for the use of Appellant's property.

The Court in *Blankinship* specifically went on to note that it did not condemn the use of a local legal rate of interest, "or other rates not explicitly keyed to rates applicable to marketable Treasury bills, notes, and bonds, as an alternative measure of just compensation for delay in payment." (at 1277)

There is no unfairness in this case. "The Condemnee's sole damage is delay in the payment of his award. His sole claim is to an additional element of compensation for the delay . . ." *Lincoln Square Slum Clearance Project,* 15 A.D. 2d 153, 179 (1st Dept. 1961), aff'd 16 N.Y. 2d 497 (1965). The Court of Appeals agreed that interest at the rate of 6% as provided by the statute in question was not so unreasonably low as to deprive the claimant of just compensation.

In *Lincoln Square Slum Clearance Project,* supra, claimant submitted evidence that a higher rate of interest would be factually the fair rate of interest for the use of money in the open money market in New York City. The evidence so offered was very similar to the evidence Appellant offered in the instant action. The Court, however, found that such evidence, even if proven, "would not overcome the presumptive applicability of §3-a" (at 181). The Court then recognized that the lower Court in *Lincoln*

"with complete fairness and wisdom . . . adopt[ed] an interest rate which common knowledge tells us reflects a reasonable balance between return and safety. The objective of Courts in eminent domain proceedings is to do substantial justice (*Homersley* v. *Mayor of City of N.Y.*, 56 N.Y. 533, 538; *U. S.* v. *Miller*, 317 U.S. 369, 375; *U. S.* v. *Cors*, 337 U. S. 325, 332); 'to see that it is just not merely to the individual whose property is taken, but to the public which is to pay for it.' (*Seal* v. *School Dist., Lake County*, 133 U. S. 553, 562; See also, *New York, Ontario and Western Ry. Co.* v. *Livingston*, 238 N.Y. 300, 306.) (at 181-2).

No doubt, Appellant can offer evidence of higher available interest rates in the open money market of New York. Nonetheless, the Court in *Blankinship*, supra noted that an interest rate applicable to a municipal, state or Federal government may well be lower than that applicable to other borrowers. (at 1276). Here, the obligation to pay was an obligation of the State of New York, a "creditor whose obligation embodies no risk of default." (Id.)

Appellant in challenging §3-a(2) offers another test in determining appropriate interest rates—that of a median average of the interest that the County of Nassau obtains on its investments plus the rate of interest payable to banks and other professional lenders on the loans they make. Such a yardstick is too speculative and is not the proper means of establishing the correct interest rate.

Appellant's second basis for attacking the decision of the Court of Appeals in the instant case rests upon the erroneous contention that the Court established a new doctrine or test regarding interest in eminent domain appropriation cases that is at variance with the decisions of the Supreme Court.

The New York Court of Appeals held that

"Compensation accruing at the time of vesting and for the period prior to an award in a condemnation proceeding 'is payable as a substitute for the beneficial use of the real property' (*Matter of Rochester Carting Co.* v. *Levitt*, 26 N.Y. 2d 264, 268)."

Appellant contends that the Court of Appeals was utilizing a "beneficial use" or net rental value test rather than a test based on the loss of the use of the money awarded for the property.

The Court of Appeals was not establishing a new test based on "beneficial use". Rather, the language used in *Rochester Carting* was *dicta*. As Appellant so appropriately noted in his Reply Brief to the Court of Appeals: "All the Court was doing was *describing* the historic function of interest, not the means of determining its fairness as just compensation." (emphasis added). (Appellants' Reply Brief, p. 8) The Court's "Beneficial use" discussion merely distinguished the basis for pre- and post-judgment interest.

III

CONCLUSION

Wherefore, Appellee respectfully submits that the question upon which this case depends is so unsubstantial as not to need further argument, and Appellee respectfully moves the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in the cause by the Court of Appeals of New York.

Respectfully submitted,

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